United States Court of Appeals

for the Minth Circuit

CAL-NEVA LODGE, INC., a Nevada Corporation, Appellant,

VS.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Nevada





United States Court of Appeals

for the Minth Circuit

CAL-NEVA LODGE, INC., a Nevada Corporation,

Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Nevada



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

to occur.]	PAGE
Additional and Supplemental Claim	13
Amended Proof of Claim Dated January 6, 1956	6
Amended Proof of Claim Dated March 6, 1956	9
Amended Proof of Claim July 23, 1956	16
Certificate of Clerk	47
Counsel, Names and Addresses of	1
Notice of Appeal	46
Objections to Amended Proof of Claim of District Director of Internal Revenue Service for the Reno District	
Opinion and Order Sustaining the Levy of the United States of June 1, 1953	34
Order Extending Time to File Petition for Review	26

INDEX	PAGE
Petition for Review	. 26
Ex. A—Findings of Fact, Conclusions of Law and Order	
Proof of Claim Dated December 27, 1955	. 3
Referee's Opinion	. 20
Statement of Points on Appeal, Appellant's	. 49

NAMES AND ADDRESSES OF COUNSEL

HOWARD W. BABCOCK,

United States Attorney,
Post Office Building,
Reno, Nevada;

LEON YUDKIN & JOSEPH O. GREAVES,

Attorneys, Office of Regional Counsel,
Internal Revenue Service,
Room 1075 Flood Building,
870 Market Street,
San Francisco 2, California,

For Appellee.

QUITTNER, STUTMAN & TREISTER,

Attorneys at Law,
639 South Spring Street,
Los Angeles 14, California;

AARON LEVINSON

Attorney at Law, 9363 Wilshire Blvd., Beverly Hills, California;

R. K. WITTENBURG,

Attorney at Law,
First National Bank Building,
Reno, Nevada,

For Appellant.



In the United States District Court for the District of Nevada

Index or Docket No. 923
In Arrangement-Chapter XI

In the matter of

CAL-NEVA LODGE, INC.; CAL-NEVA BILT-MORE & CLUB CAL-NEVA

CLAIM OF UNITED STATES FOR TAXES

State of Nevada, County of Washoe—ss.

- V. W. Evans, District Director of Internal Revenue for the District of Reno, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:
- 1. That Cal-Neva Lodge, Inc.; Cal-Neva Biltmore and Club Cal-Neva above named, is justly and truly indebted to the United States in the sum of \$205,813.52, with interest thereon as hereinafter stated.
- 2. That the nature of the said debt is internal revenue taxes due pursuant to law as follows:

Accounts for Which U. S. Claims Liens

Nature of Tax and Statute Involved: WT-FICA.

Account Number: 11-533 55L.

Year or Taxable Period Ended: 3Q55.

Date Interest Began (6% per annum): Int. 11-1-55; Assd. 11-8-55.

198,333.34

\$205,813.52

Accrued interest due as of December 15, 1955: \$210.40.

Additional interest will accrue at 6% from December 15, 1955, to date of payment of unpaid balance.

Liens claimed on above account from assessment date.

Accounts for Which U.S. Claims Priority

The sum of \$198,333.34, plus accrued interest from December 31, 1948, at the annual rate of 4% is claimed as a debt due and owing from Cal-Neva Lodge, Inc., to the U. S., because of failure of debtor to pay over certain moneys owing to Elmer F. and Helen L. Remmer upon presentation of levy. According to appropriate sections of the Int. Rev. Code, Cal-Neva Lodge. Inc. thereupon became liable in its own person for this amount, also interest at 6% on \$198,333.34 from June 1, 1953, date of levy.

3. That no part of said debt has been paid, but that the same is now due and payable at the office of the District Director of Internal Revenue at Reno, Nevada.

- 4. That there are no set-offs or counterclaims to said debt.
- 5. That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debt, except statutory liens.
- 6. That said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.
- 7. That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 659 of the Bankruptcy Act, Section 3466 of the Revised Statutes, or other applicable provisions of law. Attention is also called to the provisions of Section 3467 of the Revised Statutes, with respect to the personal liability of every executor, administrator, assignee or other person who fails to pay the claims of the United States in accordance with their priority.

Dated this 27th day of December, 1955.

/s/ V. W. EVANS,

District Director of Internal
Revenue.

Subscribed and sworn to before me this 27th day of December, 1955.

/s/ HOMER H. FORRESTER, Chief, DAR Branch.

[Endorsed]: Filed February 10, 1960.

[Title of District Court and Cause.]

AMENDED PROOF OF CLAIM (Claim of United States for Taxes)

State of Nevada, County of Washoe—ss.

V. W. Evans, District Director of Internal Revenue for the District of Reno, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:

- 1. That Cal-Neva Lodge, Inc.; Cal-Neva Biltmore and Club Cal-Neva above named, is justly and truly indebted to the United States in the sum of \$222,130.85, with interest thereon as hereinafter stated.
- 2. That the nature of the said debt is internal revenue taxes due pursuant to law as follows:

Accounts for Which U. S. Claims Liens

Nature of Tax and Statute Involved: WT-FICA.

Account Number: 11-533 55L.

Year or Taxable Period Ended: 3Q55.

Date Interest Began (6% per annum): Int. 11-1-55; Assd. 11-8-55.

Amount of Tax: \$ 7,480.18

Accrued interest due as of December 15, 1955: \$210.40.

Additional interest will accrue at 6% from December 15, 1955, to date of payment of unpaid balance.

Liens claimed on above account from assessment date.

Accounts for Which U.S. Claims Priority

Nature of Tax and Statute Involved:

WT-FICA.

Account Number: 1-1005 56L.

Year or Taxable Period Ended: 4Q55.

Date Interest Began (6% per annum): Assd. 1-6-55.

198,333.34

\$222,130.85

The sum of \$198,333.34, plus accrued interest from December 31, 1948, at the annual rate of 4% is claimed as a debt due and owing from Cal-Neva Lodge, Inc., to the U. S., because of failure of

debtor to pay over certain moneys owing to Elmer F. and Helen L. Remmer upon presentation of levy. According to appropriate sections of the Int. Rev. Code, Cal-Neva Lodge, Inc. thereupon became liable in its own person for this amount, also interest at 5% on \$198,333.34 from June 1, 1953, date of levy.

- 3. That no part of said debt has been paid, but that the same is now due and payable at the office of the District Director of Internal Revenue at Reno, Nevada.
- 4. That there are no set-offs or counterclaims to said debt.
- 5. That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debt, except statutory liens.
- 6. That said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.
- 7. That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 659 of the Bankruptcy Act, Section 3466 of the Revised Statutes, or other applicable provisions of law. Attention is also called to the provisions of Section 3467 of the Revised Statutes, with respect to the personal liability of every executor, adminis-

trator, assignee or other person who fails to pay the claims of the United States in accordance with their priority.

Dated this 6th day of January, 1956.

/s/ V. W. EVANS,

District Director of Internal
Revenue.

Subscribed and sworn to before me this 6th day of January, 1956.

/s/ HOMER H. FORRESTER, Chief, DAR Branch.

[Endorsed]: Filed February 10, 1960.

[Title of District Court and Cause.]

SECOND AMENDED PROOF OF CLAIM

State of Nevada, County of Washoe—ss.

V. W. Evans, District Director of Internal Revenue Service for the Reno District, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:

That the bankrupt(s), is justly and truly indebted to the United States for Internal Revenue taxes due pursuant to law as follows:

Taxes Secured by a Prior Lien Pursuant to Sections 6321 and 6322, Title 26, U.S.C. From the Date of Each Assessment.

Class of Tax and Period: WT-FICA 3Q55.

Assessment List: 11-533-55L.

Date of Assessment Lien date: 11-8-55.

Date Notice of Lien Filed*: 11-8-55.

Amount of Assessment: \$76,134.87.

Unassessed Penalty: None.

Interest to date: \$291.35.

Amount Outstanding: \$7,480.18.

Int. per day on bal. of Assessment: 1.23.

Total Lien Claims, \$7,771.53 plus \$1.23 per day interest.

Non-Lien Priority Tax Claims:

Class of Tax and Period: WT-FICA 4Q55.

Assessment List: 1-1005-56L.

Date of Assessment: 1-6-55.

Amount of Assessed Tax: \$16,317.33.

^{*}This date is to be considered only in determining priority as between the federal tax lien and a purchaser, mortgagee, pledgee or judgment creditor under Section 6323, Title 26, U.S.C., also claiming an interest prior to bankruptcy. For all other purposes in the proceeding and in considering priority with other categories of claimants the date of assessment is the federal tax lien date.

Interest to date of Bankruptcy:

Amount Outstanding:*\$ 16,317.33
** 198,333.34 *** 35,038.88
Total Priority Claims\$249,689.55
Total Claim
Plus
\$ 35.09

That no part of said debt has been paid, but that the same is now due and payable at the office of the District Director of Internal Revenue.

^{*}Interest at 6% per annum from asst. date claimed on outstanding bal. of this account if debtor-in-possession assets exceed liabilities.

^{**}The sum of \$198,333.34 is claimed as a debt due and owing from Cal-Neva Lodge, Inc., to the U. S., because of failure of debtor to pay over certain moneys owing to Elmer F. and Helen L. Remmer upon presentation of levy. According to appropriate sections of the Int. Rev. Code, Cal-Neva Lodge, Inc. thereupon became liable in its own person for this amount.

^{***}Interest at 4% per annum from 12/31/48, date of note, to 6/1/53, date of levy, on above sum of \$198,333.34.

^{****}Interest on above sum of \$198,333.34, plus \$35,038.88, is claimed at 6% per annum from 6/1/53, date of levy, and amounts to \$34.86 per day from 6/1/53.

That there are no set-offs or counterclaims to said debt.

That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debts, except statutory liens, or liens as above set forth.

That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.

That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 67 of the Bankruptcy Act.

/s/ V. W. EVANS,
District Director of Internal
Revenue.

Sworn to and subscribed before me this 6th day of March, 1956.

/s/ HOMER H. FORRESTER, Chief, DAR Branch.

[Endorsed]: Filed March 8, 1956.

[Title of District Court and Cause.]

ADDITIONAL AND SUPPLEMENTAL CLAIM*

*This claim is for an amount due the U. S. which is additional to the amount claimed in the U. S. Proof of Claim filed with the Clerk of the U. S. Dist. Court on March 7, 1956.

State of Nevada, County of Washoe—ss.

V. W. Evans, District Director of Internal Revenue Service for the Reno District, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:

That the bankrupt(s), is justly and truly indebted to the United States for Internal Revenue taxes due pursuant to law as follows

Taxes Secured by a Prior Lien Pursuant to Sections 6321 and 6322, Title 26, U.S.C., From the Date of Each Assessment—(Not filled out):

Non-Lien Priority Tax Claims

Class of Tax	Amount of		Amount
and Period	Tax	Penalties	Outstanding
FY 5/31/52		Del. 2,324.12	
Corp. Income	46,482.42	Fraud 23,241.21	\$ 72,047.75
FY 5/31/53	100 00= 15		
Corp. Income	168,237.15		
FY 5/31/53	E0 100 00		222 422 22
Corp. Excess Profits	58,182.88		226,420.03

FY 5/31/54 Corp. Income 77,559.55 FY 5/31/54 Corp. Excess Profits 15,750.00 93,309.55 FY 5/31/55 Corp. Income 51,933.54 Del. 12,983.39 64,916.93 Total Priority Claims \$456,694.26

Attachment B to ROSF Form 168

That no part of said debt has been paid, but that the same is now due and payable at the office of the District Director of Internal Revenue.

That there are no set-offs or counterclaims to said debt.

That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debts, except statutory liens, or liens as above set forth.

That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.

That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 67 of the Bankruptcy Act.

/s/ V. W. EVANS,

District Director of Internal
Revenue.

Sworn to and Subscribed Before Me This 20th day of March, 1956.

/s/ HOMER H. FORRESTER, Chief, DAR Branch.

Please refer to the reverse side of this form for additional information.

ROSF Form 168.

This additional and supplemental proof of claim is being submitted prior to actual assessment of the above taxes in accordance with appropriate Internal Revenue Code regulations, which provide for filing claims covering such liability whether or not the unpaid taxes have been assessed and whether or not examinations or other actions respecting the contemplated deficiencies have been completed.

Demand for payment of the above outstanding amounts in the total amount of \$456,694.26, is hereby made. A formal assessment of the tax liability of Cal-Neva Lodge, Inc., etc., for the above periods will be made upon completion of pending investigations.

/s/ V. W. EVANS,
District Director.

Sworn to and Subscribed Before Me This 20th day of March, 1956.

/s/ HOMER H. FORRESTER, Chief, DAR Branch.

[Endorsed]: Filed March 24, 1956.

[Title of District Court and Cause.]

AMENDED PROOF OF CLAIM

State of Nevada, County of Washoe—ss.

Vaughn W. Evans, District Director of Internal Revenue Service for the Reno District, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:

That the bankrupt(s), is justly and truly indebted to the United States for Internal Revenue taxes due pursuant to law as follows:

Taxes Secured by a Prior Lien Pursuant to Sections 6321 and 6322, Title 26, U.S.C., From the Date of Each Assessment—(Not filled out):

Non Lian Priority Tax Claims

Non-Lien Friority Tax Claims							
Class of Tax and Period	Assessn List		of Amount of ent Assessed Tax				
WT-FICA 4Q55 WT-FICA	1-1005	56L 1-6-56	\$ 16,317.33*	\$ 16,317.33			
Addl 3Q55	1-19051	56L 2-S-56	736.57* Int 11.90**	748.47			
FUTA 1955	1-305004	56L 2-8-56	3 2,434.98*				
CORP FY-			Int 3.19** 3 210.285.32*	2,438.17			
6/1/52-5/31		20035	Int 34,544.40** Pen 105,142.66**	349,972.38			
CORP FY-6/1/53-5/31			89,407.62*	040,012.00			
			Pen 44,703.81**	143,434.32			
CORP FY- 6/1/54-5/31			3 106,078.81* Int 4,696.53**				
			Pen 53,039.41**	163,814.75			

46,608,33

(Footnote appears on following page.)

- *Interest at 6% per annum claimed from assessment date to date of payment on these amounts if debtor's assets exceed liabilities.
- **Claim is made for the amounts representing interest and penalties on these accounts if debtor's assets exceed liabilities.
- ***The sum of \$198,333.34 is claimed as a debt due and owing from Cal-Neva Lodge, Inc., to the U. S., because of failure of debtor to pay over certain moneys owing to Elmer F. & Helen L. Remmer upon presentation of levy. According to appropriate sections of the Int. Rev. Code, Cal-Neva Lodge, Inc., thereupon became liable in its own person for this amount.
- ****Interest is claimed at rate of 4% per annum from 12/31/48, date of note, to 7/1/50, when interest rate was changed to 6% by agreement of parties. Sum of \$46,608.33, represents amount of interest due as of date of levy on 6/1/53. Further claim is made for interest on the sum of \$244,941.67 (\$198,333.34 plus \$46,608.33), at 6% per annum from 6/1/53, date of levy, to date of petition. This will amount to \$40.26 per day from 6/1/53.

Total Priority Claims \$921,667.09 plus \$40.26 per day interest from 6/1/53.

Attachment B to ROSF Form 168

That no part of said debt has been paid, but that the same is now due and payable at the office of the District Director of Internal Revenue.

That there are no set-offs or counterclaims to said debt.

That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debts, except statutory liens, or liens as above set forth.

That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.

That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 67 of the Bankruptcy Act.

/s/ V. W. EVANS,

District Director of Internal
Revenue.

Sworn to and Subscribed Before Me This 23rd day of July, 1956.

/s/ HOMER H. FORRESTER, Chief, DAR Branch.

ROSF Form 168.

[Endorsed]: Filed July 24, 1956.

In the United States District Court in and for the District of Nevada

No. 923

In the Matter of

CAL NEVA LODGE, INC., a Nevada Corporation,

Debtor.

OBJECTIONS TO AMENDED PROOF OF CLAIM OF DISTRICT DIRECTOR OF IN-TERNAL REVENUE SERVICE FOR THE RENO DISTRICT

The undersigned, the Debtor in possession herein, files its objections to the Amended Proof of Claim

of the District Director of Internal Revenue Service for the Reno District, a duly authorized agent for the United States, on the following grounds, to wit:

- (1) That the objections have already been heard and are now under submission by the Court to that portion of the Amended Claim which relates to the sum of \$198,333.34, which is claimed as a debt due and owing by the Debtor to the United States because of the failure of the Debtor to pay over certain moneys owing to Elmer F. and Helen L. Remmer, upon presentation of a levy, together with all interest claimed thereon; and for the purpose of this record, the Debtor reiterates, incorporates and makes a part hereof as though fully set forth herein, all of the grounds stated in the Amended Objections to Amended Proof of Claim of District Director of Internal Revenue Service for the Reno District, filed heretofore in this proceeding.
- (2) That the Debtor is not indebted to the District Director of Internal Revenue Service for any amount whatsoever, as set forth in said amended claim.
- (3) That said amended claim is not properly itemized and Debtor has been furnished with no proof, audit or itemization as to the basis of said claim; until such time as the District Director furnishes such proof, the Debtor is unable to audit its books or records to determine the basis of any liability, as set forth in said claim.

(4) That the penalties set forth in said amended claim are not provable or allowable under Section 57j of the Bankruptcy Act.

Wherefore, this Debtor prays that its objections be heard and appropriate orders be made.

CAL NEVA LODGE, INC., A Nevada Corporation,

By /s/ SANFORD D. ADLER, President.

QUITTNER AND STUTMAN, AARON LEVINSON and LESLIE E. RIGGINS,

By /s/ FRANCIS F. QUITTNER, Attorneys for Debtor.

Affidavit of Service by Mail attached. Receipt of Copy acknowledged.

[Endorsed]: Filed February 10, 1960.

[Title of District Court and Cause.]

REFEREE'S OPINION

On December 31, 1948, Cal Neva Lodge, Inc., purchased the Cal Neva Lodge, a property located in both the States of Nevada and California, from Elmer F. Remmer and Helen L. Remmer. As part of said consideration, Cal Neva Lodge, Inc., executed a first deed of trust on the Cal Neva Lodge property to the Remmers. To evidence the amount

of the purchase price remaining unpaid, Cal Neva Lodge, Inc., executed a note, in the State of California, to the Remmers, said note bearing interest at the rate of 4% per annum. Subsequently, the Remmers became involved in tax difficulties with the United States Government.

Pursuant to Section 6332(a) of the Internal Revenue Code, the United States, on June 1, 1953, levied upon the secured obligation of the Cal Neva Lodge, Inc., which was owing to the Remmers. Cal Neva Lodge, Inc., following said levy, sold the Cal Neva Lodge property to Park Lake Enterprises, Inc., said Park Lake Enterprises, Inc., agreeing thereupon to assume the secured obligation to the Remmers. On the basis of Section 6332(b) of the Internal Revenue Code, the United States asserts that the Cal Neva Lodge, Inc., is indebted to it in the sum of \$241,136.75 (\$198,333.34 principal, plus \$35,038.88 interest at 4% per annum, plus \$7,764.53 interest at 6% per annum from the date of the levy). There is now pending in this Court before the Honorable John R. Ross, an action by the Government against Park Lake Enterprises, Inc., to recover this claim.

Section 6332 of the Internal Revenue Code

"(a) Requirement—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

"(b) Penalty for Violation—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6% per annum from the date of such levy."

The claim of the United States against Cal Neva Lodge, Inc., for monies allegedly owing Cal Neva Lodge, Inc., to the Remmers is invalid for the reason that the Remmers themselves could not claim any liability on the note against Cal Neva Lodge, Inc., but are required by the law of the States of California and Nevada to look to the security first for payment.

The Cal Nevada Lodge is located in both the States of California and Nevada. The levy made by the United States on the Debtor herein was based upon the liability of said Debtor on its note to the Remmers at the time the levy was made. Thus, it is necessary to determine what rights, if any, the Remmers had in enforcing the note alone against the Debtor herein at the time of the Gov-

ernment's levy. A determination of these problems might normally give rise to a conflict of laws.

"The Supreme Court of the United States has laid down the following rules in reference to the law governing contracts in cases which the place of making and the place of performance are not the same: (1) Matters bearing upon the execution, interpretation and validity are determined by the law of the place where the contract is made; (2) Matters connected with the performance are regulated by the law of the place where the contract by its terms is to be performed; and (3) Matters relating to procedure depend upon the law of the forum." 11 Am. Jur., Section 118.

There is no conflict of laws problem in the instant case. Section 726 of the California Code of Civil Procedure provides that there shall be only one action maintained for the recovery of any debt secured by a mortgage and that action shall be by foreclosure. Nevada has a comparable statutory provision in NRS 40.430: "There shall be but one action for the recovery of any debt, or for the enforcement of any right secured by mortgage or lien upon real estate, or personal property, which action shall be in accordance with the provisions of NRS 40.430, 40.440 and 40.450 * * *" The Nevada statutory procedure provision and the California one are substantially the same.

"Under statutes which provide that only one action shall be maintained for the recovery of any debt secured by a mortgage and that it shall be by foreclosure, it is held that an independent action ordinarily cannot be maintained on a debt, note, or bond secured by the mortgage or deed of trust until the security has been exhausted or shown to be valueless." 59 C.J.S., Section 342(b).

A leading California case in this phase of the security field is Bank of Italy vs. G. J. Bentley (1933) 217 C. 644. In finding that the beneficiary of a deed of trust securing a note could not maintain an action on the note before exhausting his security, the Court stated: "When deeds of trust are interpreted in connection with their history in this State, there is an implied contract between the parties thereto that the land shall constitute the primary fund to secure the debt and that a valid sale under a deed of trust must be had before an action may be maintained on the note." The beneficiary under the deed of trust contended that Section 726 of the Code of Civil Procedure was the only statute of the State of California requiring that the security be exhausted before suit could be maintained on the note. He argued that Section 726 referred only to mortgages and that a deed of trust was not a mortgage. The Court ruled against the beneficiary's contention and stated that a deed of trust is merely a mortgage with a power of sale.

The trust deed taken by the Remmers on the Cal Neva Lodge property was a purchase money deed of trust. Thus, pursuant to Section 580(b) of the California Code of Civil Procedure, the United States would be completely deprived of even its

right to a deficiency on the note because of the purchase money nature of the Remmers' trust deed. For the reason stated, the Remmers could not bring an action on the note against the Cal Neva Lodge, Inc., before exhausting their security. Therefore, the United States is barred in attempting to enforce collection of the note before the security is exhausted. To permit the United States to enforce payment pursuant to Section 6332 would inflict a penalty upon the debtor herein because it would deprive said debtor of his right to have his creditors seek relief from the security of the land alone.

The Court therefore concludes that the levy upon the debtor herein in the sum of \$198,333.34 principal, plus \$35,038.88 interest at 4% per annum, should be denied for the reasons hereinabove stated, and the Court further concludes that the sum of \$7,764.53 representing interest at 6% per annum from the date of levy on the aforementioned principal and interest should be denied for the reasons that the levy itself fails to constitute a lien against the debtor.

Entered at Las Vegas, Nevada, this 31st day of March, 1959.

/s/ JOHN C. MOWBRAY, Referee in Bankruptcy.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 10, 1960.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE PETITION FOR REVIEW

At Las Vegas, in said District this 18th day of April, 1959, upon the petition of the District Director of Internal Revenue for the District of Nevada, and good cause appearing therefore.

It Is Hereby Ordered that the time within which a Petition for Review of the Order of April 18th, 1959, regarding the hearing on the Objections to Proof of Claim of District Director of Internal Revenue for the District of Nevada as Amended be, and the same is hereby extended to and including the 26th day of May, 1959.

/s/ JOHN C. MOWBRAY,
Referee in Bankruptcy.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 10, 1960.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Referee in Bankruptcy:

Pursuant to Section 39c of the Bankruptcy Act, the United States of America respectfully represents:

- (1) Your petitioner is aggrieved by the order herein of John C. Mowbray, Referee in Bankruptcy, dated and filed April 18, 1959, a copy of which is attached hereto marked Exhibit "A," and which is made a part hereof.
- (2) The Referee erred in respect to said order in that:
- (a) The objection of the debtor should not have been sustained.
- (b) There was sufficient evidence to establish that the books and records of the debtor corporation did not accurately reflect its true income.
- (c) There was sufficient evidence to warrant the application of the percentage method for reconstruction of the income of the debtor corporation.
- (d) The United States was not required to exhaust the security acquired by the Remmers on the Cal-Neva Lodge property before its claim in bank-ruptcy could be allowed.
- (e) Said order of the Referee in Bankruptcy is erroneous and contrary to law.

Wherefore, your petitioner prays that said order be reviewed by a judge in accordance with the provisions of the Act of Congress relating to Bankruptcy, and that said order and opinion be reversed; and for such other and further relief as the court deems proper. Dated: May 22, 1959.

HOWARD W. BABCOCK, United States Attorney;

By /s/ HERBERT F. AHLSWEDE, Assistant U. S. Attorney;

LEON YUDKIN & JOSEPH O. GREAVES,

Attorneys, Office of Regional Counsel, Internal Revenue Service,

By /s/ JOSEPH O. GREAVES, Attorney.

EXHIBIT A

Copy.

In the United States District Court for the District of Nevada

No. 923

In the Matter of

CAL NEVA LODGE, INC., a Nevada Corporation,

Debtor.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER RE OBJECTIONS TO PROOF OF CLAIM OF DISTRICT DIRECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF NEVADA AS AMENDED

At Reno, in Said District, on the 18th Day of April, 1959.

The instant matters came on to be heard from time to time before the undersigned Referee in Bankruptcy in his courtroom, United States Post Office Building, Reno, Nevada, upon objections filed by the Debtor herein to the Proof of Claim of the District Director of Internal Revenue for the District of Nevada as amended. The Debtor herein appeared by and through his attorneys, R. K. Wittenberg, Aaron Levinson, and Quittner, Stutman & Treister by R. K. Wittenberg, Aaron Levinson, and Francis F. Quittner. The District Director of Internal Revenue for the District of Nevada appeared by and through the United States Attorney for Nevada, Franklin Rittenhouse, and by Leon Yudkin and Joseph O. Greaves, Office of the Regional Counsel, Internal Revenue Service. The Court having heard the statements of counsel, having considered the evidence adduced, and having studied the memoranda filed herein by said counsel, and being fully advised in the premises,

Now, Therefore, this Court does hereby make its Findings of Fact, Conclusions of Law, and Order as follows:

Findings of Fact

I.

That the instant proceedings under Chapter XI of the Bankruptcy Act were commenced on the 12th day of November, 1955. That the District Director of Internal Revenue for the District of Nevada filed Proof of Claim in these proceedings dated December 27, 1955, setting forth a priority claim of

\$205,813.52. That thereafter the Debtor filed an amendment to said Proof of Claim dated January 6, 1956, setting forth a priority claim in the principal sum of \$222,130.85 plus interest. That on March 8, 1956, the Director filed a further amended Proof of Claim setting forth a priority claim of \$257,454.08 plus interest. That on March 24, 1956, the Director filed an additional Proof of Claim which increased the priority amount claimed to the total sum of \$456,694.26 plus interest. That, finally, on July 24, 1956, the Director filed his final amended Proof of Claim, said claim asserting a priority in the principal sum of \$921,667.09 plus interest thereon from and after June 1, 1953, at the rate of \$40.26 per day.

II.

That the parties hereto, by stipulation, have agreed that that portion of the said Amended Proof of Claim filed by the District Director of Internal Revenue for the District of Nevada as relates to withholding and FICA taxes for the fourth quarter of 1955 in the sum of \$16,317.33, additional withholding and FICA taxes for the third quarter of 1955 in the sum of \$736.57, and FUTA taxes for the vear 1955 in the sum of \$2,434.98 should be allowed. That the Debtor and the District Director of Internal Revenue for the District of Nevada have further, by stipulation, agreed that the Debtor's claim for a refund of cabaret taxes previously paid in the amount of \$1,371.48 should be allowed by way of deduction from the Debtor's tax obligation to the United States.

III.

That the Debtor's income tax returns were prepared from the books and records of the Debtor which books were maintained in the regular course of business and in accordance with good accounting practice in the industry and there is insufficient evidence to establish that said books and records do not accurately reflect the income and expenses of the Debtor corporation.

IV.

There is insufficient evidence to warrant application of the percentage method urged by the Government to show the true income of the Debtor.

V.

That on December 31, 1948, the Debtor, on the basis of an agreement entered into in the State of California, purchased the Cal Neva Lodge, a property located in both the States of Nevada and California, from Elmer P. Remmer and Helen L. Remmer. That to evidence the amount of the purchase price remaining unpaid on the Cal Neva Lodge property, the Debtor, in the State of California, executed a note to the Remmers bearing interest at the rate of 4% per annum. That to secure said note to the Remmers, the Debtor executed a purchase money first deed of trust on the Cal Neva Lodge property to the Remmers.

VI.

That pursuant to Section 3692 of the Internal Revenue Code, the United States on June the first

of 1953 levied upon said secured obligation of the Debtor which was owing to the Remmers, which levy was for an amount in excess of the indebtedness from the Debtor to the Remmers. That at the time of said levy, Cal Neva Lodge, Inc., was indebted to the Remmers in the amount of \$198,333.34, plus accrued interest at 4% from December 31, 1948, which was evidenced and secured by the promissory note and deed of trust referred to in paragraph V. Said indebtedness was not subject to any attachment or execution under any judical process at the time of the levy. That subsequent to said levy of June 1, 1953, the Debtor sold the Cal Neva Lodge, Inc., to the Park Lake Enterprises and agreed thereupon to assume the secured obligation to the Remmers.

VII.

That neither the Remmers nor the United States as a creditor of the Remmers has exhausted the security acquired by the Remmers on the Cal Neva Lodge property by virtue of the above-described purchase money first deed of trust given to the Remmers, nor has any payment been made by the Debtor, Cal Neva Lodge, Inc., to the United States of America pursuant to the levy made on Cal Neva Lodge, Inc., referred to in paragraph VI.

Conclusions of Law

I.

The objections of the Debtor to the amended Proof of Claim of the District Director of Internal

Revenue for the District of Nevada are sustained, save and except for those specific sums stipulated to by the parties as being validly owing and/or validly entitled to offset, as said sums are set forth in Findings of Fact No. II herein. That as to those items of indebtedness less the credit set forth as aforesaid in Findings of Fact No. II, the objections of the Debtor are overruled.

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is Ordered, Adjudged and Decreed:

T.

That the amended claim of the District Director of Internal Revenue for the District of Nevada on file herein in the principal sum of \$921,667.09 plus interest thereon be, and the same is, hereby disallowed, save and except for the sum of \$18,117.40, which said sum of \$18,117.40 only is allowed as a claim entitled to priority pursuant to the provisions of Section 64a(4) of the Bankruptcy Act.

/s/ JOHN C. MOWBRAY, Referee in Bankruptcy.

Received and Filed April 18, 1959.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 10, 1960.

In the United States District Court for the District of Nevada

In Proceedings for an Arrangement No. 923

In the Matter of

CAL-NEVA LODGE, INC., a Nevada Corporation,

Debtor.

OPINION AND ORDER SUSTAINING THE LEVY OF THE UNITED STATES OF JUNE 1, 1953

Collection of Federal taxes is governed by Federal law. State statutes cannot be invoked to frustrate that collection. It is well established that the law of the forum determines the nature, the form, and the extent of the remedy. As elsewhere, this principle obtains in the area of tax collection.

In the instant case, this Court is the forum. And in applying the remedy in aid of the collection of a Federal tax, this tribunal will be guided by the law of the forum—in other words, by Federal law.

1. Statement of the Case.

On April 1, 1959, the Referee in Bankruptcy filed an opinion holding that the levy of the United States upon a secured obligation of Cal-Neva Lodge, Inc., owing to Elmer F. Remmer and Helen L. Remmer, should be denied, and further concluding that the sum of \$7,764.53, representing interest at 6% from the date of the levy should be denied "for the reasons (sic) that the levy itself fails to constitute a lien against the debtor."

On April 18, 1959, the Referee filed "Findings of Fact, Conclusions of Law, and Order re Objections to Proof of Claim of District Director of Internal Revenue for the District of Nevada (hereinafter the Director) as Amended." The Referee's Order read as follows:

"That the amended claim of the District Director of Internal Revenue for the District of Nevada on file herein in the principal sum of \$921,667.09 plus interest be, and the same is, hereby disallowed, save and except for the sum of \$18,117.40, which said sum of \$18,117.40 only is allowed as a claim entitled to priority pursuant to the provisions of Section 64a(4) of the Bankruptcy Act."

On May 26, 1959, the United States filed a Petition for Review of the Order of the Referee of April 18, 1959, complaining, among other things, that:

- (a) The United States was not required to exhaust the security acquired by the Remmers on the Cal-Neva Lodge property before its claim in bank-ruptcy could be allowed.
- (b) The order of the Referee in Bankruptcy is erroneous and contrary to law.

On February 10, 1960, the Referee filed his Certificate of Review, which contained the following statement:

"Since the filing of the said Petition for Review the * * * Director * * * has abandoned that portion of its Review (sic) relating to alleged income taxes claimed as owing by the Debtor herein to the United States by filing an amended claim eliminating all claims for income taxes and penalties and interest thereon. The only matter now in controversy relates to the effect of the levy by the United States on June 1, 1953, on the secured obligation of the Debtor then owing to the Remmers."

It is solely to the effect of the levy of June 1, 1953, therefore, that this opinion is directed.

2. Statement of Facts.

Cal-Neva Lodge, Inc., hereinafter the debtor, accepts the statement of facts set out in the Referee's Opinion of March 31, 1959, and this Court does likewise.

On December 31, 1948, the debtor purchased the Cal-Neva Lodge, a property located in both Nevada and California, from Elmer F. Remmer and Helen L. Remmer. As part of the consideration, the debtor executed a first deed of trust on the Cal-Neva Lodge property to the Remmers. To evidence the amount of the purchase price remaining unpaid, the debtor issued a note in California, to the Remmers, the note bearing four (4%) per cent interest.

Subsequently, the Remmers became involved in tax difficulties with the United States.

On June 1, 1953, the United States levied upon the secured obligation of the debtor, which was owing to the Remmers. At the time of the levy, the debtor owed the Remmers \$198,333.34, plus accrued interest at 4% from December 31, 1948. In addition, the United States asserted a claim for interest at 6% from the date of the levy.

At this juncture, both parties and the Referee himself have fallen into a common error. All three assume that the claim of the United States was asserted pursuant to "Section 6332(b) of the Internal Revenue Code of 1954." But Section 6332(b) was enacted on August 16, 1954, and, according to 26 USCA 7851(6)(B), Section 6332, being part of Chapter 64 of Title 26, became effective "On and after January 1, 1955." As we have seen, the levy by the United States was made on June 1, 1953.

As a matter of law, the levy of the United States was made under the provisions of Section 3692 of the Internal Revenue Code of 1939, which was enacted on February 10, 1939, and which, except as to certain provisions not relevant here, took effect "on the day following the date of its enactment."

The section relating to the "Surrender of property subject to distraint," however, is 26 USCA 3710, which is part of the Internal Revenue Code of 1939. The pertinent portion of that section follows:

[&]quot;Section 3710. Surrender of Property Subject to Distraint.

⁽a) Requirement. Any person in possession of property, or rights to property, subject to distraint,

upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty for Violation. Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy."

After the levy, the debtor sold the Cal-Neva Lodge property to Park Lake Enterprises, Inc., which agreed to assume the secured obligation to the Remmers.

The United States previously, and originally, asserted that the debtor was indebted to it in the sum of \$241,136.75, \$198,333.34 as principal, and \$35,038.88 as interest at 4%, plus \$7,764.53 as interest at 6% per annum from the date of levy. As we have seen, the United States now has eliminated "all claims for income taxes and penalties and interest thereon."

3. Federal Tax Liens and the Provisions for Their Collection Are "Strictly Federal and Strictly Statutory."

Both the debtor and the Referee in Bankruptcy make frequent references to California and Nevada law in support of their position that "there shall be only one action maintained for the recovery of any debt secured by a mortgage and that action shall be by foreclosure" and "In California, at least, even the right to recover on the note for any deficiency remaining after foreclosure is denied in the case of a purchase money mortgage," etc.

The problem before this Court is to be decided according to Federal and not State authority. The Ninth Court of Appeals, in Bank of Nevada vs. United States, 9 Cir., 1957, 251 F.2d 820, 824, certiorari denied, 1958, 356 U. S. 938, declared:

"The Supreme Court has repeatedly and emphatically stated that Federal tax liens and the provisions for their collection are strictly Federal and strictly statutory." (Many authorities cited and quoted.)

Quoting the above language with approval, our Court of Appeals followed the Bank of Nevada decision in United States vs. Christensen, 9 Cir., 1959, 269 F.2d 624, 637.

This, then, is the climate in which this Court must assess the debtor's contentions.

4. The Statutory Prohibition Against the Collection of a Penalty in a Bankruptcy Case Is No Longer Relevant in This Proceeding.

Despite the fact that, in the Referee's "Certificate on Review," filed on February 10, 1960, it was specifically stated that the United States had filed "an amended claim eliminating all claims for income taxes and penalties," etc., the debtor, in its "Reply Memorandum," filed more than two months later, insists that "the claim asserted against the Debtor by the United States under Section 6332(b) of the Internal Revenue Code must be disallowed in these proceedings as a penalty," etc.

Accordingly, in the present Opinion and Order, this Court will devote but little time to the "penalty" issue so earnestly raised by the debtor.

5. The Levy of the United States Upon the Debtor's Secured Obligation in Favor the Remmers Was Completely Effectual.

In his opinion of April 1, 1959, the Referee ruled that "The claim of the United States against Cal Neva Lodge, Inc., for monies allegedly owing (by?) Cal Neva Lodge, Inc., to the Remmers is invalid for the reason that the Remmers themselves could not claim any liability on the note against Cal Neva Lodge, Inc., but are required by the law of the State of California and Nevada to look to the security first for payment."

In addition, the debtor "bases its objection to the allowance of the amended Proof of Claim of the

* * * Director * * * on dual grounds. Initially, * * * the attempted levy by the United States * * * was completely ineffectual. Secondly * * * the claim asserted against the Debtor * * * must be disallowed * * * as a penalty," etc.

In the preceding section of this Opinion and Order, this Court has disposed of the debtor's second contention. Attention is therefore now addressed to the debtor's first objection. Namely: that the attempted levy by the United States was completely ineffectual.

At the outset, it should be borne in mind that it is a hornbook principle that "the law of the forum governs as to the nature, form, and extent of the remedy." (Emphasis supplied.) 15 CJS, Conflict of Laws, Section 9, Page 878; Section 22, Pages 948-952; 17 CJS, Contracts, Section 21, Pages 353-354.

It must be to Federal law, then, that we must look for guidance in determining the rights of the parties in the instant case.

The United States levied upon and seized the debt, not the security, which the debtor owed Remmer.

In United States v. Eiland, 4 Cir., 1955, 223 F. 2d 118, 121, Chief Judge Parker said:

"There can be no question, we think, but that the lien for taxes provided by the statute can be asserted against intangible property such as a debt. (Many cases cited.) And we think it equally clear that the proper way to assert the lien is by levy and notice such as was served here."

The claim of the United States for a debt seized prior to bankruptcy, under 11 USCA 104(a)(5), is a priority claim.

In the case of In re Cherry Valley Homes, Inc., 3 Cir., 1958, 255 F. 2d 706, 707, certiorari denied, 1958, 358 U.S. 864, the Court used the following language:

"In legal contemplation and consequence, this levy effectively and exclusively appropriated the debt to the satisfaction of the tax claim six months before the Chapter X proceeding was instituted. (Cases cited.) Such a levy is treated in law like a seizure of corporeal property, taken into possession of a collector by way of distraint for taxes. (Authorities cited.) * * * By whatever name the appropriation shall be called, it seems clearly sufficient to establish a priority of right to satisfaction which the debtor's subsequent insolvency does not affect."

The remedy of the United States to enforce collection of taxes by the summary administrative method of distraint "is a special privilege it has which is analogous to, but in addition to, garnishment and other remedies of an ordinary creditor." (Cases cited.) United States vs. Manufacturers Trust Co., 2 Cir., 1952, 198 F. 2d 366, 368.

Continuing, in the Manufacturers Trust decision, Judge Chase said:

"It (the Government's remedy) is a constitutionally valid expedient for the collection of taxes necessary to the very existence of government (cases cited), and has been available by law since 1791." (Case cited.)

A claim by the United States under 11 USCA, 104(a)(5), supra, based upon a levy upon a bankrupt prior to bankruptcy, is an allowable one. In the Cherry Valley Homes case, supra, 255 F. 2d at Page 707, the Court observed:

"Alternatively, as the government urges here, since the possessory concept of 'seizure' is not strictly applicable to a debt, it seems correct to say that the tax levy through process served upon the debtor at least accomplished an assignment of Tobin's claim against Cherry Valley to the United States by operation of law. This approach brings into decisive effect the provision of Revised Statutes, Section 3466, 31 U.S.C.A., Section 191, that 'whenever any person indebted to the United States is insolvent * * * the debts due to the United States shall be first satisfied.' This language has been applied to claims, originally between private parties, the benefit of which has in various ways been assigned or transferred to the United States. (Cases cited.) We think it applies here as well."

Such a claim is not a penalty in the instant case. Double liability is not sought. The debtor is merely required to render unto Caesar the things that are Caesar's. Cal-Neva must pay only what it otherwise would be required to pay to Remmer.

As was remarked in the Eiland case, supra, 223 F. 2d at Page 121:

"The effect of the federal taxing statutes to which we have referred is to create a statutory attachment and garnishment in which the service of notice provided by statute takes the place of the court process in the ordinary garnishment proceeding. There is no necessity for adjudicating the amount of the tax under the statutory proceeding (cases cited); and, consequently the service of such notice results in what is virtually a transfer to the government of the indebtedness, or the amount thereof necessary to pay the tax, so that payment to the government pursuant to the levy and notice is a complete defense to the debtor against any action brought against him on account of the debt."

Cal-Neva was indebted to Remmer at the time the United States levied on that debt. The obligation was due at that time. The debtor's failure to pay was a withholding of funds owing to the United States, for which the debtor must pay interest of 6% for electing not to pay the money at the time of the levy.

¹See also Columbian Nat. Life Ins. Co. v. Welch, 1 Cir., 1937, 88 F. 2d 333; and Bank of Nevada v. United States, supra, 251 F. 2d at Page 828.

In United States v. Childs, 1924, 266 U.S. 304, 309-310, the Supreme Court adverted to the distinction between interest and penalty, saying:

"The tax in this case is one on income; a burden imposed for the support of the Government. Interest is put upon it and so denominated, distinguished from the 5% as penalty, clearly intended to compensate the delay in payment of the tax—the detriment of its non-payment, to be continued during the time of its non-payment—compensation, not punishment."

Furthermore, the United States in this case has specifically eliminated all claims for income taxes and penalties and interest.

To summarize, the claim of the United States for money owing to the Remmers by the debtor Cal-Neva, which was levied upon prior to bankruptcy, is hereby allowed as a priority claim under 11 USCA, 104 (a)(5).

6. Conclusion.

In view of the holding of this Court regarding the levy of the United States, infra, and the abandonment by the United States of all its other claims, the Order of the Referee in Bankruptcy dated April 18, 1959, is hereby set aside, and in its stead the following Order is substituted:

Order

The levy of the United States on June 1, 1953, upon the secured obligation of the debtor then owing

to Elmer F. Remmer and Helen L. Remmer, in the amount of \$198,333.34, plus accrued interest at 4% from December 31, 1948, plus interest at 6% from the date of the levy, was completely effectual, and it is hereby sustained.

It is so Ordered.

Dated at Carson City, Nevada, this 27th day of June, 1960.

/s/ JOHN R. ROSS, United States District Judge.

[Endorsed]: Filed June 27, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Cal-Neva Lodge, Inc., hereby appeals to the United States Court of Appeals for the Ninth Circuit from the "Opinion and Order Sustaining the Levy of the United States of June 1, 1953," dated June 27, 1960, made by the Honorable John R. Ross, Judge of the United States District Court, which reverses the Order of the Referee of April 18, 1959.

Dated: This 25th day of July, 1960.

Respectfully Submitted,

CAL-NEVA LODGE, INC.,
A Nevada Corporation, by Its
Attorneys,

AARON LEVINSON, R. K. WITTENBERG, QUITTNER, STUTMAN & TREISTER,

By /s/ HERMAN L. GLATT.

[Endorsed]: Filed July 26, 1960.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT

United States of America, District of Nevada—ss.

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents, listed in the attached index, are the originals filed in this court, or true and correct copies of docket entries in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 9th day of August, 1960.

[Seal] OLIVER F. PRATT,
Clerk, U. S. District Court.

By /s/ [Indistinguishable],
Deputy.

[Endorsed]: No. 17046. United States Court of Appeals for the Ninth Circuit. Cal-Neva Lodge. Inc., a Nevada Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed August 10, 1960.

Docketed August 17, 1960.

/s/ FRANK H. SCHMID.

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 17046

In the Matter of

CAL-NEVA LODGE, INC.,

VS.

UNITED STATES.

APPELLANT'S STATEMENT OF POINTS ON APPEAL

Comes now Cal-Neva Lodge, Inc., the Appellant herein, and pursuant to Rule 75d of the Federal Rules of Civil Procedure, furnishes the following Statement of Points on Appeal:

- 1. That by its levy of June 1, 1953, the United States succeeded only to the rights had by Elmer and Helen Remmer, its tax debtors, against Cal-Neva Lodge, Inc.
- 2. That the nature of the rights to which the United States succeeded by virtue of its levy of June 1, 1953, must be determined by state law.
- 3. That the United States' levy of June 1, 1953, was ineffective in that the United States failed to seize the trust deed securing the indebtedness of Cal-Neva Lodge, Inc., to the Remmers.
- 4. That the United States, assuming its levy of June 1, 1953, was effective, was required to exhaust the security had by the Remmers against the Cal-Neva realty before it could attempt to assert

any deficiency claim against the Estate of Cal-Neva Lodge, Inc.

- 5. That by virtue of the fact that the Remmers' security was a purchase money trust deed, neither the Remmers nor the United States, as successor to their interest, were entitled to any deficiency from Cal-Neva Lodge, Inc.
- 6. That the entire claim asserted by the United States against Cal-Neva Lodge, Inc., is penal in nature and must be disallowed pursuant to the provisions of section 57 of the Bankruptcy Act.
- 7. That that portion of the claim asserted by the United States against Cal-Neva Lodge, Inc., as is for interest at a rate in excess of 4%, the rate contractually agreed upon between the Remmers and Cal-Neva Lodge, Inc., is penal in nature and must be disallowed pursuant to provisions of Section 57 of the Bankruptcy Act.

Dated: This 25th day of July, 1960.

Respectfully Submitted,

CAL-NEVA LODGE, INC.,
A Nevada Corporation, by Its
Attorneys,

AARON LEVINSON, R. K. WITTENBERG, QUITTNER, STUTMAN & TREISTER,

By /s/ HERMAN L. GLATT.

[Endorsed]: Filed September 2, 1960.